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No. 86-502

In The

Supreme Court of the United States

OCTOBER TERM, 1986

CUMBERLAND OIL CORPORATION AND SUGAR GROVE, LTD.,

Petitioners,

vs.

JAMES THROPP, GREGORY THROPP, ARROWHEAD GAS PRODUCERS, INC., AND SOUTHERN TIER, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondents hereby state that Arrowhead Gas Producers, Inc. is a wholly owned subsidiary of Southern Tier Gas Producers Ltd. (incorrectly named as Southern Tier, Inc.). There are no other subsidiaries or affiliates of either corporation.

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STATEMENT OF THE CASE

The court below, the United States Court of Appeals for the Second Circuit, affirmed a grant of summary judgment dismissing petitioners' complaint. *Cumberland Oil Corp. v. Thropp,* 791 F.2d 1037 (2d Cir. 1986). Petitioners seek review of the Second Circuit's decision by writ of certiorari. This brief is submitted on behalf of all named respondents in opposition to the petition for writ of certiorari.

A. *The Benchmark/Cumberland agreement.*

In March of 1980 petitioner Cumberland Oil Corporation (hereinafter referred to as "Cumberland") entered into a series of contracts with Benchmark Oil, Inc. (hereinafter referred to as "Benchmark") in connection with a planned gas drilling and development program. The investors in the program were collectively represented by petitioner Sugargrove Ltd., a Georgia limited partnership. Chief among the agreements between Benchmark and Cumberland was a drilling and development agreement, whereby Benchmark agreed to drill three gas wells for Cumberland for a fixed or turnkey price. The drilling agreement was executed by the corporate parties on March 22, 1980. None of the respondents was a party to the contract.

Thereafter, Benchmark drilled three gas wells for petitioner Cumberland. When problems developed with one of the wells, Benchmark redrilled it at no additional cost to Cumberland. Thus, in effect, Benchmark drilled four gas wells and received the agreed price for three.

In addition, as required by the parties' contract, Benchmark completed and hooked up Cumberland's gas wells. The parties agree that all three wells produced gas. However, Cumberland contends that only one of the three wells produces gas in an amount which justifies commercial sale.

During the summer of 1980, both before and after it drilled Cumberland's wells, Benchmark was engaged in the drilling and completion of numerous other gas wells. Between March and October of 1980, Benchmark drilled 22 separate gas wells. However, the company suffered certain financial reverses, and in October of 1980, an involuntary petition in bankruptcy was filed against Benchmark. Ultimately, Benchmark was liquidated in Bankruptcy Court, and it is now a defunct corporation.

Although it had notice of Benchmark's bankruptcy proceedings from their inception in October of 1980, Cumberland took no action against Benchmark in Bankruptcy Court. At no time did it file a proof of claim in Bankruptcy Court. Nor did it commence any adversary proceedings against Benchmark. Rather, throughout the entire period of the Benchmark bankruptcy, Cumberland brought no legal proceedings against Benchmark.

B. *The proceedings below.*

In May of 1983, after the Benchmark bankruptcy proceedings were concluded, Cumberland commenced the instant action in United States District Court for the Western District of New York. Jurisdiction was based on diversity of citizenship. 28 U.S.C. §1332. Cumberland did not name Benchmark as a party defendant. Instead, it named the four respondents in this proceeding: Gregory Thropp, who was President and sole shareholder of Benchmark; James Thropp, who was Gregory's father and alleged to have been a "de facto" principal of Benchmark; Arrowhead Gas Producers, Inc., a corporation owned by the Thropps which purchased Benchmark's assets in Bankruptcy Court; and Southern Tier, Inc. (correctly identified as Southern Tier Gas Producers Ltd.), Arrowhead's parent corporation.

Petitioners' original complaint set forth claims for fraud, breach of contract, and negligence in the drilling of Cumberland's wells. By memorandum-decision and order dated October 5, 1983, the Honorable Michael A. Telesca, United States

District Judge for the Western District of New York, dismissed petitioners' claims for breach of contract and negligence. The court ruled that such claims could have been brought only against Benchmark. Furthermore, the District Court dismissed petitioner's fraud claim against all defendants other than Gregory Thropp.

Thereafter, petitioners filed two amended complaints. The District Court ultimately ruled that their second amended complaint pleaded a claim for fraudulent misrepresentation under New York law, not only against Gregory Thropp, but against the remaining respondents as aiders and abettors. The court specifically noted that, while petitioners had pleaded such a claim, it made no finding that they had proven any such claims.

Considerable discovery was conducted in the case. Finally, pursuant to the District Court's scheduling order, discovery was concluded and cross-motions for summary judgment were filed. Respondents moved for summary judgment dismissing petitioners' complaint on two grounds: first, respondents argued that petitioners' failure to file a claim in the Benchmark bankruptcy proceeding precluded them from maintaining the instant action; secondly, respondents argued that, as a matter of New York law, petitioners could not prove a claim for fraud.

In a decision and order dated August 29, 1985, the Honorable Michael A. Telesca granted respondents' motion for summary judgment dismissing petitioners' complaint. In short, the District Court ruled that under *Mitchell Excavators. Inc. v. Mitchell,* 734 F.2d 129 (2d Cir. 1984), the respondents' claim for fraud was, in essence, an asset of the Benchmark bankruptcy estate. As such, the claim belonged to the trustee in bankruptcy, but not to individual creditors such as the petitioners. Therefore, the District Court ruled that their claims should have been presented first to the Bankruptcy Court.

Petitioners appealed to the United States Court of Appeals for the Second Circuit. Petitioners argued that *Mitchell Excavators,*

supra, was inapplicable to the instant case. Respondents argued that the District Court had correctly applied *Mitchell Excavators* to the facts below. In addition, respondents renewed their alternative argument which had been raised in District Court — namely, that petitioners had no claim for fraud under New York Law.

In an opinion dated May 30, 1986, the United States Court of Appeals for the Second Circuit affirmed the grant of summary judgment dismissing petitioners' complaint. *Cumberland Oil Corp. v. Thropp,* 791 F.2d 1037 (2nd Cir. 1986) (a copy of the opinion of the Court of Appeals is reproduced as Appendix B, annexed to the petition for a writ of certiorari). The Court of Appeals held that *Mitchell Excavators. Inc. v. Mitchell, supra,* did not bar the instant action. However, the court went on to hold that, under New York law, respondents were entitled to summary judgment dismissing petitioners' complaint. The court held that petitioners had failed to establish at least one of the elements of a claim for fraud under New York law, specifically, proximate cause. *Id.;* Appendix B-17. Furthermore, the Court of Appeals noted that there was some question as to whether Gregory Thropp's alleged misrepresentations were statements of fact which would give rise to a claim for fraud. *Id.;* Appendix B-16.

Accordingly, on the basis of New York law which governs this diversity action, the Court of Appeals affirmed the grant of summary judgment dismissing petitioners' complaint as a matter of law. Petitioners sought a rehearing, but their application was denied. Appendix C. This petition for a writ of certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

A. *The Second Circuit correctly decided the issues raised in this case.*

The Court of Appeals for the Second Circuit ruled that petitioners had no claim for fraud under New York law, as they had

no proof of proximate cause. Petitioners allege that they were fraudulently induced to enter into the drilling and development contract with Benchmark. Nevertheless, the record shows that petitioner Cumberland received exactly what it contracted for — three gas wells. Benchmark drilled, completed, and hooked up three wells for Cumberland as agreed. Moreover, when one well developed problems, Benchmark redrilled it at no extra cost.

The parties were in dispute as to the results of Benchmark's efforts. Petitioners contend that only one well produced gas in commercially salable quantities. Respondents contend, however, that all three wells would produce gas if properly tended. The fact remains that Benchmark completed petitioners' wells as promised. The drilling and development agreement contained no warranties or representations regarding the level of gas production.

In addition, the record demonstrated, without contradiction, that Benchmark was actively engaged in the drilling of gas wells throughout the spring and summer of 1980. In all, Benchmark drilled 22 wells. When drilling and completing petitioners' wells, Benchmark utilized its full regular field crew — close to 25 employees. Also, as stated, Benchmark drilled a fourth well for petitioners at no extra cost.

Thus, any of petitioners' alleged damages resulted from the inherent uncertainties of natural gas production. Petitioners' alleged damages were entirely unrelated to the conduct of any of the respondents in connection with the negotiations for, or execution of, the Benchmark/Cumberland drilling and development agreement. Although petitioners contend that the Thropps misrepresented that Benchmark was ready, willing and able to perform the drilling agreement, the record demonstrates exactly the opposite. Benchmark was not only ready, willing and able to perform, it did perform beyond the requirements of the agreement.

The questions presented by petitioners suggest that the Court of Appeals improperly affirmed the grant of summary judgment

in the face of issues of fact. Petitioners further suggest that the court below improperly concluded that no proof of damages could be established. These questions are insufficient to warrant the exercise of certiorari by this court. In the first place, as indicated above, the Second Circuit correctly decided the case. Secondly, petitioners are really arguing that the court below decided this case incorrectly. This court has stated that it does, "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). Accordingly, the petition for a writ of certiorari should be denied.

B. *The decision of the Second Circuit does not demonstrate any conflict in the interpretation of federal law.*

Rule 17.1 of the Rules of This Court states that review by writ of certiorari may be appropriate when a federal Court of Appeals has rendered a decision which creates a significant conflict in the interpretation of federal law. RULES OF SUP. CT. 17.1. This consideration is entirely absent from the instant case.

The sole federal issue reached by the Court of Appeals for the Second Circuit was the application of *Mitchell Excavators. Inc. v. Mitchell,* 734 F.2d 129 (2d Cir. 1984), to the facts of this case. Specifically, the Second Circuit ruled that its holding in *Mitchell Excavators, supra,* did not require that petitioners' claim first be presented to the Bankruptcy Court. The court ruled that the fraud cause of action belonged to petitioner Cumberland, and not to Benchmark or the trustee in bankruptcy. Appendix B-12. Thus, petitioners could maintain this action despite their failure to proceed against Benchmark in Bankruptcy Court.

In the first place, this ruling was favorable to the petitioners and is not challenged by any party to these proceedings. In the second place, this ruling did not conflict with any ruling of any other Court of Appeals. Rather, the Second Circuit merely determined that its prior holding was not applicable to the facts of this case.

Thus, as this case involves no conflict regarding federal law, and as none of the considerations set forth in Rule 17.1 are present, the petition for a writ of certiorari should be denied.

C. *The decision of the Second Circuit turned on an application of New York substantive law.*

This is a diversity action. Accordingly, the substantive law of New York applies under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). Therefore, in ruling that petitioners could not sustain a claim for fraudulent misrepresentation, the Second Circuit applied New York law to the facts of this case.

First, the Second Circuit set forth the essential elements of a claim for fraud in New York. *See* Appendix B-16. Next, the court reviewed the facts of this case in light of these essential elements. Specifically, the Second Circuit ruled that petitioners had failed to demonstrate the essential element of proximate cause. Appendix B-17. Furthermore, the court noted, in dictum, that respondents' alleged misrepresentations were not necessarily statements of fact which are required to sustain a claim for fraud. Appendix B-16.

The courts of the State of New York are the final authorities for determining the substantive issues of law raised in this action. In diversity cases, however, the Court of Appeals for the Second Circuit is often called upon to interpret and apply New York law to diversity cases pending in the federal courts within the Second Circuit. This Court has recognized that, under these circumstances, the appropriate tribunal in the federal system for resolving issues of state law is the Second Circuit Court of Appeals, and not the United States Supreme Court. "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position. . .to determine how local courts would dispose of comparable issues." *Butner v. United*

States, 440 U.S. 48, 58 (1979). As the decision below turned on the application of New York State law, the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: October 16, 1986

Respectfully submitted,

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